

March 1, 2006

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: XM Satellite's Proposed Acquisition of WCS Licenses, WT Docket No. 05-256

Dear Mr. Chairman:

As the Commission continues its consideration of the proposed acquisition by XM Satellite Radio Holdings, Inc. ("XM") of 16 blocks of Wireless Communications Service ("WCS") spectrum, NAB again requests that XM not be permitted to evade, by acquiring these new licenses, the authorization of the Satellite Digital Audio Radio Service ("SDARS") as a national service. NAB explained in opposing XM's application that the applicants have not shown that this acquisition will serve the public interest. Accordingly, the Commission cannot, on the information as yet provided by the applicants, approve the proposed license transfer from WCS Wireless, Inc. to XM. At a minimum, even if the Commission does eventually receive adequate information and grants the transfer of these WCS licenses, appropriate conditions should be imposed to prevent XM from circumventing earlier WCS and SDARS orders intended to support the public's interest in a vibrant and vital terrestrial radio service.

In opposing XM's application, NAB explained in detail that the applicants have not provided sufficient information to show that the transfer of the WCS licenses will serve the public interest. As importantly, WCS Wireless, Inc. appears to be violating the Commission's trafficking rules, and it has still failed to rebut the *prima facie* case of trafficking.

Even beyond this failure, the applicants have not demonstrated that XM's use of the WCS spectrum will be consistent with the public interest, particularly in maintaining "a vibrant and vital terrestrial radio service for the public." The Commission authorized SDARS in 1997 with the express understanding that it was a "national service," and promised to "take any necessary action to safeguard the important service that terrestrial radio provides."¹ The Commission took

¹ Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC RCD 5754, 5763, 5769 (1997) ("SDARS Authorization Order").

such action in 2001 by imposing conditions on the use of SDARS terrestrial repeaters.² Moreover, in its order establishing the WCS, the Commission prohibited terrestrial broadcasting on the WCS bands.³ But as previously explained by NAB, the scant information XM has offered to date strongly suggests that it plans to use the WCS spectrum to provide localized services integrated with its SDARS service in a manner contravening both the prohibition on terrestrial broadcasting in the WCS bands and the long-standing SDARS policies intended to support the public's interest in terrestrial broadcasting. Thus, XM has not yet shown that the proposed transfer of WCS licenses is consistent with existing Commission law and policy and with the public interest.

Even if at this late date the applicants were to provide sufficient information for the Commission to determine that the proposed transaction serves some elements of the public interest, conditions will clearly be necessary to ensure that XM does not circumvent the *SDARS Authorization Order*, the *SDARS Repeater STA* and the *WCS Authorization Order*. The Commission must ensure that XM, by acquiring these new licenses, does not evade nine years of consistent Commission policy. At a minimum, the Commission needs to formulate and impose conditions to prevent XM from using its spectrum, including the new WCS spectrum, to locally originate programming, to provide local service, or to engage in terrestrial broadcasting. NAB also urges the Commission to follow through on its promise to "monitor and evaluate the potential and actual impact of satellite DARS, particularly in small radio markets." *SDARS Authorization Order*, 12 FCC Rcd at 5769.

NAB would be happy to discuss these or any other issues pertaining to the proposed XM acquisition at your convenience.

Sincerely,



David K. Rehr

cc: The Honorable Michael J. Copps, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner
The Honorable Deborah Taylor Tate, Commissioner

² Specifically, the Commission restricted repeater use to the "simultaneous retransmission of programming, in its entirety, transmitted by the satellite directly to SDARS subscriber's receivers." Order and Authorization, *XM Radio, Inc. Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters*, 16 FCC Rcd 16781, 16784-85 (2001) ("*SDARS Repeaters STA*").

³ Report and Order, *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10785, 10797-98, 10800 n.70 (1997) ("*WCS Authorization Order*").